OCT 23 1979
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SUPREME COURT, U.S.

79-5555

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. _____

ALBERT IRVIN CATES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the

Untied States Court of Appeals for the Fifth Circuit

Albert Irvin Cates, Pro Se
P.O. Box 5949
Austin, Texas 78763

SUBJECT INDEX

	Page
THIS INDEX	i
TABLES OF CASES	ii
REFERENCE TO OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF CASE	2
REASONS FOR GRANTING WRIT	2
CONCLUSION	4
SIGNATURE OF PETITIONER, PRO SE	4
CERTIFICATE OF SERVICE	5
APPENDIX A-Opinion	
APPENDIX B-Order on Petition for Rehearing	

TABLES OF CASES

	Page
Fassette v. U.S., 444 F.Supp. 1245 (C.D. CA 1978)	3
U.S. v. Burman, (4th Cir. 1979)	2
U.S. v. Dankert, 507 F.2d 190 (5th Cir. 1975)	2
U.S. v. Jacobson, 578 F.2d 863 (10th Cir. 1978)	2
U.S. v. Jacquinto, 464 F.Supp. 728 (E.D. Penn. 1979)	3
U.S. v. Mearns, 461 F.Supp. 641 (Del. 1978)	3
U.S. v. Ortiz, 488 F2d 175 (C.D. Cal. 1973)	4

Other Authorities

21 U.S.C. §963

28 U.S.C., Section 1254(1)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979

NO. 78-3664

ALBERT IRVIN CATES,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ALBERT IRVIN CATES, prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit entered in this cause July 3, 1979, petition for rehearing denied September 24, 1979.

REFERENCE TO OPINION BELOW

The opinion and order of the United States Court of Appeals for the Fifth Circuit are not reported. Copies of the opinion and the order denying rehearing are appended hereto in Appendix, infra, A and B.

JURISDICTION

The opinion and judgement of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on July 3, 1979; timely filed Motion for Rehearing was denied September 24, 1979. The jurisdiction of this Court is involed under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Is it permissible to impose a special parole term as part of punishment for conviction under 21 U.S.C. §963?

2. If imposition of such a special parole term is permissible, is it mandatory to impose such a parole term in the event a criminal defendant is sentenced to a prison term under 21 U.S.C. §963?

STATUTORY PROVISIONS INVOLVED

21 U.S.C. §960 (b)(1): In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

21 U.S.C. §963: Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Petitioner was indicted in a multi-count indictment from the Northern District of Texas. Upon a Rule 20 Motion, the case was transferred to the Western District of Texas, Austin Division, wherein the Petitioner pled guilty to one (1) count alleging a violation of 21 U.S.C. 963. A sentence of two (2) years imprisonment was imposed; in addition, the Court imposed a three (3) year special parole term, which the Court characterized as mandatory (Trans. p. 15).

REASONS FOR GRANTING WRIT

I. SPECIAL PAROLE TERMS ARE NOT PERMISSIBLE

Three Circuit Courts of Appeal have addressed the issues presented here for review. United States v. Dankert 507 F2d 190 (5th Cir. 1975); United States v. Jacobson 578 F2d 863 (10th Cir. 1978), U.S. cert. den. in 99 S.Ct. 324 (1978); United States v. Burman (4th Cir. 1979). (These cases either address themselves to 21 U.S.C. §963 or else 21 U.S.C. §846; however, these are analagous statutes. Thus, as analysis of one is tantamount to analysis of the other, cases involving either statute will be employed in this petition without

further reference to the particular statute.) All three Courts of Appeal have concluded that a imposition of special parole term under 21 U.S.C. §963 is permissible. Nevertheless, all three of these decisions are set forth in summary opinions; the rationale and legal bases for the conclusions of the Courts are not enunciated.

This lack of rationale can be attributed to the fact that no logical foundation premises these decisions. None of the opinions examine Congressional intent; none examine the grammatical and syntactical construction of the statutory language. Findings of fact in these areas would indeed undermine the conclusions of the Courts of Appeal.

Such findings of fact have been made by a competent Court of Law, however. The seminal case in this regard is Fassette v. United States 444 F.Supp.1245 (C.D.Cal.1978). In Fassette, the Court examined both Congressional intent and statutory construction, finding that imposition of a special parole term was illegal. Relying on Fassette, two other Courts have reached the same conclusion on identical findings of law ans fact. See: United States v. Mearns 461 F.Supp. 641 (Del. 1978). and United States v. Jacquinto 464 F.Supp. 728 (E.D. Penn. 1979). The opinions from these District Courts are articulate and well-reasoned, each striking deeply into the inadequacies of the decisions from the various Courts of Appeal previously mentioned.

The effect of the decisions allowing the imposition of a special parole term under 21 U.S.C. §963 is to permit, without statutory guidance, the same punishment for conspiracy as for the substantive offense which was the object of the conspiracy. In other words, this allows punishment for a crime which was never alleged or tried; such judicial findings of guilt erode the most basic concepts of due process.

Further, the Government has apparently adopted a policy of "no appeal" from those district court decisions which have

found the special parole term illegal. Therefore, this has created a de facto conflict between the Circuits; this inequitable and uneven distribution of justice demands resolution in the form of review by this Honorable Court.

II. EVEN IF PERMISSIBLE A SPECIAL PAROLE TERM IS NOT MANDATORY UNDER 21 U.S.C. §963

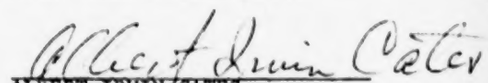
Even if it is accepted that a special parole term is permissible if imposed together with a prison term under 21 U.S.C. §963, it does not follow that such a special parole term is mandatory. Although a special parole term is mandatory under sentence for the offense of importation, punishment for the inchaote offense of consporacy to import under 21 U.S.C. §963 merely "may not exceed the maximum punishment" for the substantive offense; this is not the equivalent of stating that sentencing for conspiracy must be identical to the punishment for the substantive offense. No Court has ever directly confronted this issue.

In the present case, the trial judge sentenced petitioner under the misapprehension that a special parole term was mandatory (Trans. p.15). Sentencing under such conditions is illegal because the judge's discretion is unduly fettered by this miscomprehension of state of law. (United States v. Ortiz 488 F2d 175 (C.D. Cal. 1973).

CONCLUSION

For the reasons set forth above, petition for writ of certiorari should be granted and a further hearing on the merits the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,



ALBERT IRVIN CATES,
P.O. Box 5949
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Petitioner, Pro Se

FILED
OCT 4 1979
Cl. By ... Clerk Deputy

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-3664
Summary Calendar*

DO NOT PUBLISH

ALBERT IRVIN CATES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of Texas

(JULY 3, 1979)

BEFORE CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

We affirm for the reasons stated in the trial court's order of June 29, 1978. Cates, a pro-se appellant, urges us to disregard our earlier opinion in United States v. Dankert, 507 F.2d 190 (5th Cir. 1975). It is squarely in point and, as he may be unaware, one panel of our court does not overrule another.

AFFIRMED.

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-3664

U.S. COURT OF APPEALS
FILED
SEP 24 1979
GILBERT F. GANUCHEAU
CLERK

ALBERT IRVIN CATES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING

(September 24, 1979)

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied .

ENTERED FOR THE COURT:

Thomas Gibbs Gee
United States Circuit Judge

79-5555

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JUN 29 1978

BY _____ CLERK

UNITED STATES OF AMERICA *
*
V. * CRIMINAL NO. A-77-CR-41
*
ALBERT IRVIN CATES *

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ORDER

Came on before the Court Defendant's motion to correct an illegal sentence alleging that Defendant was improperly assessed a special parole term of three years in addition to his sentence of two years' confinement in the penitentiary. Defendant alleges that he was convicted and sentenced under 21 U.S.C. § 846, when in fact the record reflects that he was convicted and sentenced under 21 U.S.C. § 963.

Defendant relies on a case out of the Central District of California that holds that special parole terms are not assessable as part of the permissible range of punishments under 21 U.S.C. § 846. Fassette v. United States, 444 F. Supp. 1245 (C.D. Calif. 1978). Defendant's reliance on the Fassette case is misplaced.

In the first place, the Court emphasizes that Defendant was convicted and sentenced under 21 U.S.C. § 963, not § 846. With regard to 21 U.S.C. § 963, the Fifth Circuit has explicitly held that a special parole term may be assessed under that statute. United States v. Dankert, 507 F.2d 190 (5th Cir. 1975). The Dankert case is, of course, a binding precedent upon this Court.

The Court notes in passing that the validity of the Fassette holding is in doubt even with regard to 21 U.S.C. § 846 given the number of reported cases which have upheld, although perhaps not explicitly addressing the question, sentences under § 846 which included special parole terms. United States v. DeLaFuente, 550 F.2d 309 (5th Cir. 1977). See also, United States v. Armedo-Sarmiento, 545 F.2d 785 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977); United States v. Wiley, 519 F.2d 1348 (2d Cir. 1975); Timmreck v. United States, 423 F. Supp. 537 (E.D. Mich. 1976); United States v. Merlino, 391 F. Supp. 533 (E.D. Pa. 1975).

Accordingly, the motion to vacate an illegal sentence is DENIED.

Entered this 29 day of June 1978, at Austin, Texas.